

This matter first came before Administrative Law Judge Jon L. Frobish on April 2, 2003, when, after hearing testimony and examining the exhibits, the ALJ denied claimant's request for temporary total disability compensation, but awarded claimant temporary partial disability compensation. The parties were confused with regard to that Order, and the matter again came before Judge Frobish on September 3, 2003. From that hearing, he issued his Order dated September 12, 2003, granting respondent a credit against payment of "temporary total disability" from the money claimant received as a subcontractor on certain siding jobs.

This, again, confused the parties, and, after additional contact with the ALJ, Judge Frobish issued his Order Nunc Pro Tunc dated September 19, 2003, at which time he clarified that the credit was to be against payments of “temporary partial disability.” The ALJ also ordered the temporary partial disability to begin December 3, 2002, and granted respondent credit for 48 weeks of “money” (unexplained) that claimant had received. The ALJ also stated that claimant was entitled to 41.43 weeks temporary partial disability compensation as of the date of Order.

This, again, confused the parties and, after respondent’s attorney wrote to the ALJ, Judge Frobish issued a letter dated October 9, 2003, at which time he clarified that the Order indicated an average weekly wage of \$487.27 and a compensation rate of \$324.86. The terms “temporary total” and “temporary partial” were not used by the ALJ in the October 9, 2003 letter.

To add to the confusion, respondent’s attorney advised claimant’s attorney in a letter dated February 18, 2004, that respondent had reinstated “temporary total” effective January 28, 2004. Respondent also filed a Motion to terminate temporary total disability compensation, which came before Judge Hursh on February 24, 2004. From that hearing, Judge Hursh issued his Order terminating “temporary partial” disability benefits as of the date of the Order, finding that the medical evidence provided by Oklahoma physical medicine and rehabilitation specialist Timothy G. Pettingell, M.D., indicated that claimant’s injury involved only the right upper extremity at the shoulder level and, therefore, temporary partial disability was not appropriate under K.S.A. 44-510d(a)(13).

Respondent, in its brief to the Board, also noted that claimant’s application for hearing, requesting medical treatment for his neck injury and temporary total disability compensation for that neck condition, was set for hearing on April 27, 2004. It should be noted that the Orders issued by Judge Frobish on April 2, 2003, September 12, 2003, and September 19, 2003, and the October 9, 2003 letter, were not appealed to the Board. The only Order presently before the Board is that of Judge Hursh from February 25, 2004. A preliminary hearing was held on April 27, 2004, from which an Order dated April 29, 2004, was issued by Judge Hursh. However, that matter is not before the Board for consideration at this time. The only dispute before this Board is claimant’s entitlement to temporary partial disability compensation, as this benefit was denied by the ALJ.

Appeals from preliminary hearings are limited. Findings with regard to whether an employee suffered accidental injury, whether the injury arose out of and in the course of employment, whether notice is given or claim timely made, or whether certain defenses apply, are considered jurisdictional and subject to review by the Board on appeal from preliminary hearings.¹ Additionally, the Board may take jurisdiction of an appeal if it is

¹ K.S.A. 44-534a.

alleged that an ALJ exceeded his or her jurisdiction in granting or denying the benefits requested at preliminary hearing.

The Board finds that the ALJ did not exceed his jurisdiction in terminating claimant's temporary partial disability benefits. K.S.A. 44-510d allows for the award of temporary total disability compensation or permanent partial general disability for injuries which are contained within the schedule. However, there is no provision under that section of the statute for temporary partial disability compensation. The ALJ's determination that the medical supported only an injury to the right upper extremity at the shoulder is a determination well within the ALJ's jurisdiction at preliminary hearing. The Board, therefore, cannot find that the ALJ exceeded his jurisdiction in denying the temporary partial disability benefits. As such, the Board does not have jurisdiction over this matter and claimant's appeal should be dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Kenneth J. Hursh dated February 25, 2004, remains in full force and effect and the application for review filed by claimant should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of May 2004.

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Leigh C. Hudson, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director